No. [illegible]

United States Circuit Court of Appeals for the Ninth Circuit.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, A CORPORATION, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

This is an action in 10 counts alleging violations of the so-called "hours-of-service act" (34 Stat., 1415). These 10 counts relate to excessive service of one Longabaugh, an agent and telegrapher in the employ of the plaintiff in error on the 21st day of April, 1913, and on the nine next succeeding days.

The actual hours of service of Longabaugh on each of these days was from 7 a. m. until 12 o'clock

midnight. From 7 a. m. until 7 p. m. on the days alleged he was on duty as agent, and from 7 p. m. until midnight as telegraph operator. The interstate character of the railroad and of the service of this employee was admitted. (Rec., p. 28.)

As telegraph operator during the time specified when he acted as such he was engaged in handling orders pertaining to and affecting the movement of trains at Wallula, a continuously operated day and night office. (Rec., p. 28.) Before said Longabaugh had performed any of the excess service alleged he was instructed by his superior officer not to work in excess of 9 hours in any 24-hour period, either as agent or operator or in both capacities, and his excess service was without the actual knowledge of his superior officers.

The District Court overruled a motion of the carrier that judgment be entered in its favor, and a jury trial having been waived entered its judgment for the Government on each of the 10 counts involved. The case is here on writ of error based on two assignments of error.

The first assignment in substance is that the court erred in denying a motion for judgment for the defendant, and the second is that the court erred in entering judgment for the plaintiff. (Rec., p. 33.)

QUESTIONS INVOLVED.

If a railroad employee works in excess of the period fixed by law, is the carrier relieved from

penalty by reason of instructions given to said employee not to violate the law?

Is the railroad excused for such excess service when the superior officers of such employee have no knowledge of such excess service?

ARGUMENT.

The employee in question was regularly engaged in the work of this carrier for 19 hours a day for 10 days. The employment of other telegraphers must have correlated with Longabaugh's service. The office was connected with the train dispatcher's office by telegraph.

The hours when the office was open and an agent in charge must necessarily have been known by the superior officers. If no other station agent was employed there must have been such *general* knowledge of the situation at the office in question that the lack of specific knowledge as to Longabaugh's particular hours of service, while admitted as a fact, seems to furnish no defense to the carrier. It is a situation of ignorance of conditions where proper railroading seems to call for knowledge, even if railroading, as ordinarily conducted, does not seem to make knowledge of such conditions absolutely unavoidable.

However that may be, this case must stand upon the hypothesis that no superior official of this carrier had knowledge that Longabaugh was for 10 days working 19 hours a day.

Does lack of knowledge on the part of superior officers of excess service rendered by employees constitute a defense to the carrier in the prosecution for violation of the hours-of-service act?

Congress foresaw that this law would, in a marked degree, be unenforceable if the issue of the knowledge of superior officers of a railroad could be put in issue, aside from the application of the rule that knowledge and due care are not elements in this class of cases. (*St. Louis, Iron Mountain & Southern Railway* v. *Taylor,* 210 U. S., 281, and cases cited; *Chicago, Burlington & Quincy Railway* v. *United States,* 220 U. S., 559, and cases cited.)

Congress enacted a provision as follows:

> In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of *all* its officers and agents. (Sec. 3.) [Our italics.]

Even though it is admitted that the excess service of said Longabaugh was not known to his superior officers that does not foreclose the question of the knowledge of any one of "all its officers and agents."

Again, as the learned judge of the District Court suggested (Rec., p. 22), the statute provides that the carrier shall be deemed to have knowledge of all acts of all agents, and this includes knowledge of the acts of Agent Longabaugh.

Broadly construed, the portion of section 3 referred to seems to have been intended to exclude entirely as a defense lack of knowledge of the hours of service of its employees.

Without any such provisions the safety-appliance act has been held to be absolute and to permit no defense of want of knowledge of defects in appliances.

When Congress has attempted to expressly exclude the question of knowledge vel non from the hours of service law, no narrow interpretation to the excluding clause should be applied which would restrict the application of the act where statutes of a similar character, not expressly attempting to legislate upon the question of knowledge, have been broadly interpreted to exclude the question of knowledge as an issue.

There may be, as to cases under this statute, a fair presumption that employees exceeding the statutory limitation are so clearly acting according to the presumed interests and intention of the employing carrier at that particular time and place that the carrier is concluded from raising the question of intent or knowledge.

Take the case in question: A continuously operated office had not a sufficient force of telegraphers to do the work. The agent, in addition to his own work, performed an additional stint of service as telegrapher each day to keep the service of his employer from suffering any impairment or delay.

May not this be so much in the interests of the employer that the latter should be concluded from any denial of knowledge or authority?

The *situation* was Longabaugh's authority to act in the employers' behalf upon the employers' re-

sponsibility to the law until the employer relieved the situation by furnishing an adequate force to perform the service without excess service on the part of any employee.

If the question of knowledge on the part of carriers is open, then *as to telegraphers especially* there is danger from men accommodating each other and performing additional shifts or turns of duty without knowledge of superior officials, and thereby enhancing the menace at which this law was aimed.

The public and the Government can only look to the carrier who has assumed the operations of a railroad to compel adherence to the limit of service fixed by Congress. The law deals with the carrier. The statute affixes a liability for a *carrier* permitting excess service as well as for officers and agents requiring or permitting excess service.

Is the carrier excused if the superior officials of a railroad order a telegrapher at a continuously operated day and night office not to remain on duty more than 9 hours, and such telegrapher remains on duty in the performance of the regular routine work of the carrier for 19 hours a day for 10 days?

Instructions to obey the law will not excuse if the law is violated.

The agent and operator in this case was at least passively permitted by the carrier to work in excess of the statutory period.

Perhaps the superior officers would be excused under the circumstances from the liability fixed by

this statute upon them personally, but the Government makes no admission that this would be so.

But the statute places a liability upon the corporation itself for permitting excess service; and here the corporation not only allowed and permitted the excess service, but fully availed itself for 10 days of the full benefits of the extra service of this agent.

A corporation may well be presumed to know the assignment and tours of duty of its employees.

" Require or permit," as those words occur in this statute, may not be restricted to a technical or strictly literal interpretation, but may well be considered in view of the manifest purpose and intent of the act to have the meaning of " allow," " suffer," or " tolerate."

The terms used, " require or permit," show that the act was to have a more extended meaning than an intentional requirement or order. Thus the question of an affirmative order to do the work was eliminated.

" Permit," without any forced construction may be read, " allow," or perhaps " suffer " or " tolerate," which are recognized synonyms.

" Permit " does not always retain its positive sense. It is often used with the sense of not preventing.

> By this act it (Congress) sought to *prevent* railroad employees from working consecutively longer than the period prescribed, as completely and effectively as could be accomplished by legislation. (*United States* v.

Kansas City Southern Railway Co., 202 Fed., 828.)

The intent of Congress was to prohibit the excess service in the interest of public safety.

A prohibition by the carriers' officers, while laudable, is not of vital consequence when Congress has prohibited and penalized.

The express sanction or disapprobation of the carrier is negligible where the *law* prohibits and the carrier's employee for a continuous period is suffered and negatively permitted by the carrier to do the prohibited act under circumstances which come within the scope of the intent of Congress to promote safety.

The construction of the act herein contended for seems to have been adopted by District Judge Hazel in *United States* v. *Delaware, Lackawanna & Western R. Co.,* Western District of New York, May 22, 1914, not reported. In this case, charging the jury, Judge Hazel said:

> This action is brought by the Government against the defendant railroad company to recover penalties for violation of the hours-of-service law, so called, enacted by Congress, in the year 1907, and *which absolutely prohibits railway employees, crews of trains, and dispatchers from remaining on duty for a longer period than 16 consecutive hours.* * * *
>
> Now, this statute absolutely provides that the employees of railroad companies having charge of the movements of trains shall not

perform their duty more than 16 consecutive hours, unless conditions arise which exculpate or excuse the defendant, such as I have read.

Respectfully submitted.

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